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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

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9 GIOVANNI VALERIO,

Case No. 2:10-cv-01806-GMN-GWF

10 Petitioner,

11 v.

ORDER

12 ANTHONY SCILLIA, *et al.*,

13 Respondents.

14 The Court is setting this represented habeas matter under 28 U.S.C. § 2254 for an
15 evidentiary hearing directed to all factual issues pertaining to petitioner Giovanni Valerio's
16 claim of equitable tolling of the federal limitation period.

17 In the prehearing memoranda directed by this order, the parties shall include, *inter*
18 *alia*, briefing also directed to the following two issues.

19 *First*, the parties shall address whether factual inquiry on remand into whether
20 petitioner could have or should have discovered earlier that defense counsel had failed
21 to file a direct appeal is consistent with the Ninth Circuit's August 5, 2013, remand order.

22 It appears to be undisputed that defense counsel told Valerio that she would file a
23 direct appeal but that she did not do so. The state district court's grant of *Lozada* petition¹
24 relief in 2004 was inherently based upon an arguably presumptively correct factual finding
25 that counsel failed to file a requested appeal after stating that she would do so. (ECF No.
26

27 ¹ See *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994). Nevada later replaced
28 the judge-crafted *Lozada* petition remedy with an out-of-time direct appeal procedure
pursuant to NRAP 4(c).

1 44-13, at 5, 7, & 9-11; ECF No. 44-14, at 6 & 7.) Defense counsel further affirms in her
2 June 13, 2011, declaration, *inter alia*, that she does not believe that she thereafter
3 informed Valerio that she had failed to file a direct appeal. (ECF No. 44-34, at 3.)

4 Valerio filed his first state petition alleging that defense counsel had failed to file a
5 direct appeal on June 27, 2003, just over ten months after the direct appeal deadline had
6 expired on August 12, 2002.

7 This Court's May 20, 2011, dismissal order noted that Valerio had not been "explicit
8 as to when, exactly, he 'should have known' or did know that there was no appeal
9 pending." The order granted the respondents' motion to dismiss because, *inter alia*,
10 Valerio had "provide[d] no evidence or even argument that he personally took any steps
11 to establish the status of his appeal either by attempting to contact his counsel or the
12 court," and he "offer[ed] no showing whatsoever that he diligently [pursued] his own
13 appeal rights." (ECF No. 14, at 6.)

14 The Ninth Circuit's August 5, 2013, order reversing and remanding did not explicitly
15 reference any further factual inquiry into either (a) when Valerio "should have known" that
16 an appeal had not been filed and/or (b) regarding the extent to which "he personally took
17 any steps to establish the status of his appeal either by attempting to contact his counsel
18 or the court." Rather, the Ninth Circuit remanded for this Court to address "an unresolved
19 factual dispute regarding *when* Valerio *learned* that no direct appeal had been filed and,
20 *thereafter*, what efforts were undertaken by Valerio to appeal his conviction." (ECF No.
21 24, at 2, with emphasis added. *See also id.*, at 2-3.)

22 The Ninth Circuit's order remanding for this factual inquiry was entered against a
23 backdrop in which, again, (a) it was undisputed in the state courts that defense counsel
24 told Valerio that she would file an appeal, and (b) he came to a conclusion, despite her
25 representation to him that she was filing an appeal, that she nonetheless had not done
26 so a matter of only months, not years, after the direct appeal time had expired.

27 The parties therefore shall address in the prehearing briefing the question of
28 whether the Ninth Circuit's remand order contemplates, or even permits, a post-remand

1 inquiry by this Court into whether Valerio is not entitled to equitable tolling because he
2 allegedly could have or should have engaged in more extensive efforts earlier to
3 independently determine whether an appeal in fact had been filed after defense counsel
4 had told him that she would file one.

5 Second, the parties shall address (a) whether Ninth Circuit law requires petitioner
6 to affirmatively demonstrate diligence through to the filing of the federal petition under the
7 Circuit’s “stop clock” approach to equitable tolling, and (b) if Ninth Circuit law does
8 *arguendo* require such a demonstration, whether Valerio factually did exercise such
9 diligence through to the filing of the federal petition, including specifically during the
10 second, 337-day otherwise untolled period after June 17, 2008, up to May 21, 2009.

11 Subsequent to the Court of Appeals’ August 13, 2013, order reversing and
12 remanding in this case, the Ninth Circuit adopted the “stop clock” approach specifically
13 for equitable tolling in habeas cases in *Gibbs v. Legrand*, 767 F.3d 879 (9th Cir. 2014).
14 Under this approach, an equitable tolling event operates in the same manner as a
15 statutory tolling event, *i.e.* “stopping” the one-year federal limitation “clock” for the duration
16 of the tolling event. *See, e.g., Luna v. Kernan*, 784 F.3d 640, 651 (9th Cir. 2015). Since
17 *Gibbs*, opinions by Ninth Circuit panels and/or judges have debated the impact of *Gibbs*
18 on prior Circuit authority that suggested – albeit not while applying a “stop clock” approach
19 – that a petitioner must demonstrate diligence also after the equitable tolling event
20 ceases. Panels and judges have debated both (a) whether Ninth Circuit law currently is
21 resolved on the point of whether a petitioner or other party must demonstrate diligence
22 also after the equitable tolling event ceases, and (b) what the rule should be under the
23 “stop clock” approach. *Compare Grant v. Swarthout*, 862 F.3d 914, 924-25 & n.9 (9th Cir.
24 2017), *Bobadilla v. Gipson*, No. 14-56461, 679 Fed.Appx. 600, 601-02 & n.1 (9th Cir.,
25 March 8, 2017) (Murguia, dissenting), and *Knight v. California Department of Corrections*,
26 Nos. 11-17350 & 14-16262, 629 Fed.Appx. 817, 818 (9th Cir., Nov. 5, 2015), with *In re*
27 *Milby*, 875 F.3d 1229, 1233-34 (9th Cir. 2017) (in bankruptcy context), and *Luna*, 784 F.3d
28 at 651-52. *See also Zamudio-Reyes v. Becerra*, No. 15-15518, 708 Fed.Appx. 463, 464

1 (9th Cir., Jan. 9, 2018) (suggesting that *Gibbs* held that the proper inquiry is whether the
2 petitioner exercised reasonable diligence during the equitable tolling event, not after).

3 In the present case, there are two otherwise untolled periods potentially in dispute,
4 being (1) a 318-day period after August 12, 2002, up to June 27, 2003, and (2) a 337-day
5 period after June 17, 2008, up to May 21, 2009. If, following an evidentiary hearing, the
6 Court ultimately were to find that Valerio is entitled to equitable tolling for the first period
7 – or for at the very least 290 of those 318 days – that would be a sufficient number of
8 days under the Circuit’s “stop clock” approach to potentially overcome the limitation
9 defense. In such a circumstance, Valerio would have a total of, at worst, only 365 or less
10 untolled days. In that circumstance, the above-described issues debated within the Ninth
11 Circuit would come to the fore in the present case.

12 The parties therefore shall address (a) the legal issue of whether a petitioner must
13 demonstrate diligence also after an equitable tolling event ceases under controlling Ninth
14 Circuit law, (b) if so, the factual issue of whether Valerio engaged in such diligence in this
15 case during the potentially relevant times, including the second, 337-day period.

16 At the evidentiary hearing, the parties of course may make an appropriate record
17 of the facts underlying their positions in order to preserve their factual and legal arguments
18 for possible later review. The parties further may introduce evidence subject to
19 reservation as to an alternative legal position regarding the materiality of the evidence
20 under, *inter alia*, the remand order. However, the Court wishes to have the issues outlined
21 herein, including the issue concerning the scope of the inquiry on remand, addressed in
22 the prehearing memoranda heading into the hearing.

23 Counsel further should not assume that post-hearing memoranda or other further
24 serial briefing of tolling-related issues will be ordered as a matter of course following the
25 hearing. The Court is seeking to bring all equitable tolling related legal and factual issues
26 to a head for a resolution in the district court via the evidentiary hearing and the following
27 findings, conclusions and order. The Court potentially may rule either from the bench
28 following the hearing or thereafter without further briefing.

1 IT THEREFORE IS ORDERED that the matter is set for an evidentiary hearing for
2 9:00 a.m. on Friday, June 28, 2019, in Courtroom 7D, Lloyd D. George United States
3 Courthouse, 333 Las Vegas Blvd., Las Vegas, Nevada, on all factual issues pertaining to
4 petitioner's claim of equitable tolling of the federal limitation period.

5 IT FURTHER IS ORDERED that counsel shall complete the following pre-hearing
6 procedures:

- 7 1. **Exchange of Preliminary Witness and Exhibit Lists and Stipulations.** No later
8 than **twenty-eight (28) days** prior to the hearing, counsel shall confer together
9 either in person or by telephone and shall exchange preliminary exhibit and
10 witness lists, exchange (either in person or indirectly such as via mail, email or fax)
11 any exhibits not already possessed by opposing counsel, and discuss stipulations
12 as to authenticity and any evidentiary objections.
- 13 2. **Final Witness and Exhibit Lists and Evidentiary Objections.** No later than
14 **twenty-one (21) days** prior to the hearing, counsel shall jointly file a consolidated
15 final list of the witnesses and exhibits to be offered jointly and/or by each party and
16 which shall further identify any evidentiary objections that may be anticipated in
17 advance of the hearing. No party will be allowed to introduce over objection any
18 witness or exhibit not listed in the final witness and exhibit list, except that a party
19 may file a supplement no later than **fourteen (14) days** prior to the hearing listing
20 evidence in response to any witness or exhibit identified for the first time in the final
21 list. No objection that may be anticipated in advance of the hearing will be
22 preserved unless raised in the final list.
- 23 3. **Depositions.** The parties may introduce the depositions taken in discovery in lieu
24 of live testimony by the witnesses, except as to controverted testimony where the
25 Court will be called upon to make a credibility determination, in which case the
26 witness must be called live.
- 27 4. **Length of Hearing; Interpreters; Other Housekeeping Matters.** The Court
28 anticipates that the hearing possibly may take up to a full day. If counsel (a)

1 anticipate that the hearing will run longer than one full day, (b) anticipate that an
2 interpreter will be needed for a party or a witness, or (c) have other housekeeping
3 matters to address regarding the hearing, they shall contact Courtroom
4 Administrator Aaron Blazeovich at 702-464-5421 regarding same no later than
5 **twenty-one (21) days** prior to the hearing.

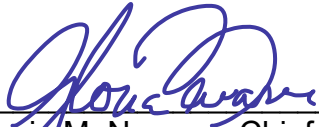
6 5. **Prisoner Transport Order and Subpoenas of Non-Prisoner Witnesses.** No
7 later than **fourteen (14) days** before the hearing, petitioner's counsel shall submit
8 an order to transport prisoner to secure petitioner's presence at the hearing; and
9 any party wishing to call any other prisoner to testify similarly shall submit an order
10 to transport prisoner by that date. No continuance will be granted for failure to
11 secure the attendance of the petitioner or any other prisoner unless an order to
12 transport prisoner was timely sought. Similarly, no continuance will be granted for
13 failure to secure the attendance of a non-prisoner witness who was not seasonably
14 subpoenaed. **Each prisoner-transport order shall include the following**
15 **sentence as the final paragraph: "The Clerk of Court additionally shall**
16 **provide a copy of this order to the Marshal's Las Vegas office."**

17 6. **Pre-hearing Memoranda.** No later than **seven (7) calendar days** prior to the
18 hearing, counsel for petitioner and for respondents each shall file a pre-hearing
19 memorandum setting forth the evidence that they expect to present at the hearing
20 together with their legal argument regarding the issues to be raised by the
21 anticipated evidence presented by the parties at the hearing.

22 7. **Exhibit Binders.** On the morning of the hearing, counsel for petitioner and for
23 respondents each shall provide to the Courtroom Administrator three binders or
24 sets of exhibit binders, with one such binder or set of binders containing the
25 exhibits offered for introduction at the hearing, and the other binder or sets being
26 for the staff attorney and trial judge. Each counsel additionally shall provide one
27 additional binder or set of binders to opposing counsel. If joint exhibits are
28 submitted, counsel shall arrange between themselves similarly to provide to the

1 Courtroom Administrator three binders or sets of exhibit binders containing the joint
2 exhibits. The "original" exhibits within the binder(s) for the witness each shall be
3 marked by an exhibit sticker, prior to being copied for the other sets of binders.
4 Any lengthy exhibits that are not otherwise internally numbered and that likely will
5 be referenced in detail during live testimony shall be Bates-number stamped for
6 ease of reference during the testimony. If electronic exhibits are provided to the
7 Court, only two physical binders or set of binders shall be required for the Court
8 and the trial judge's copy will not be required. Electronic exhibits must be
9 submitted on a thumb drive, CD, DVD, or hard drive, and will be kept by the Court.

10 DATED THIS March 4, 2019

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15 Gloria M. Navarro, Chief Judge
16 United States District Court
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